THE *BNA ACT* AND THE CHARTER: TWO MINTS IN ONE

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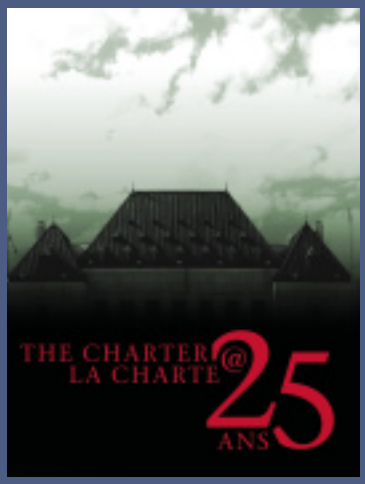

In this concluding instalment of our year-long series, *The Charter @ 25*, Policy Options' Editor reflects on Canada's twin constitutional traditions, the one handed down from the British North America Act, 1867, with its emphasis on the division of powers, and the newer one from the Charter of Rights and Freedoms of 1982, with its emphasis on the rights of citizens. Taken together, they are two mints in one.

Dans ce dernier article de notre série annuelle sur les 25 ans de la Charte des droits et libertés, notre rédacteur en chef revient sur la double tradition constitutionnelle du Canada : l'une de l'Acte de l'Amérique du Nord britannique de 1867, qui touche la division des pouvoirs, l'autre de la Charte de 1982, qui privilégie les droits des citoyens. Deux traditions qui forment l'avers et le revers d'une même médaille.

There are now two constitutional traditions in Canada, the British North America Act of 1867 (BNA Act), now known as the *Constitution Act*, and the Charter of Rights and Freedoms of 1982. One gave birth to our country; the other has had a transformational effect on it, arguably far beyond the intent of its framers. One defined the rights of government, and the division of powers; the other has since defined the rights of citizens.

In other words, Canada is two mints in one. The first is fundamentally about the division of powers in sections 91 and 92 of the *BNA Act,* as well as the asymmetrical nature of the federation in sections 93 and 133, among others.

The second is fundamentally about individual rights, security of the person in article 7 and equality rights in article 15 of the Charter, as well as the symmetrical nature of the federation. The notion of the equality of the provinces is apparent in the unanimity required by part of the amending formula. Parliament and nine legislatures could vote to abolish the Crown, but the 10th, Prince Edward Island, could veto it.

In the *BNA* tradition, Ottawa's powers are invested in section 91, the POGG — "Peace, Order and good government" — defence, foreign affairs, international trade, the economic union. The powers of the provinces are in section 92, including health care, daycare and cities.

As for asymmetrical federalism, it was not created with the Health Accord of 2004. It's found in section 93 of the *BNA Act*, enabling confessional schools in Quebec and, later, Newfoundland. And in section 133, recognizing French and English as the languages of the courts and legislature in Quebec.

Consider section 133:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

This is the fundamental bargain of Confederation. The bilingual character of our country has its very origins in the duality of our legal heritage. Long before there was a Charter of Rights, this duality was reflected in the *Constitution Act, 1867*. This is classical federalism, federalism as it was intended by the fathers of Confederation. Without the division of powers, without the asymmetrical features to accommodate Quebec's religion and its English-language minority, Sir John A. Macdonald would not have been the father of our country.

In his important new book, *John A: The Man Who Made Us*, Richard Gwyn writes of the drafting of the *BNA Act* at the third and least known of the Confederation Conferences, in London in 1866-67. Though Macdonald would have preferred a strong central government, with the provinces reduced to the status of municipalities, that was never on. The Canadian compromise was born there, in the division of power of 91 and 92, and the asymmetric features of 93 and 133.

As Gwyn writes: "In no sense was the *British North America Act* a constitution made for the people. There was nowhere in it any ringing 'We, the people' proclamation. It was, instead, a constitution made for governments. Over the decades, the balance between centralization and decentralization of governmental powers has settled down into pretty much what most Canadians want. Pragmatism has tri-

umphed over principle, and muddling through over theory. Macdonald would disagree with the resulting decentralization, but as a pragmatist and as a believer that politics is about people, he would be delighted by the process."

Where fault lines have surfaced in the federation in the last 40 years, it has usually been because Ottawa has used the federal spending power to occupy areas of exclusive provincial jurisdiction. This is centralizing federalism, and for decades it has fanned the flames of separatism in Quebec and alienation in Alberta.

The Conservatives, from Sir John A. Macdonald to Stephen Harper, are the party of classical federalism. The Liberals, from Lester Pearson to Paul Martin, are the party of centralizing federalism, as are the NDP, from Tommy Douglas to Jack Layton. The Conservatives are the *BNA* party. The Liberals are the Charter party.

After a quarter-century of Charter ascendancy, we are experiencing a renewal of our *BNA* inheritance. What Harper is proposing, and implementing, isn't "open federalism." It's classical federalism.

The most important thing he said in his Quebec City speech of December 19, 2005, wasn't his promise to address the fiscal imbalance, it was his pledge not to invoke the federal spending power in provincial jurisdiction without the approval of a majority of provinces.

Harper followed up in the October Speech from the Throne.

> *The government believes that the constitutional jurisdiction of each order of government should be respected. To this end, guided by our federalism of openness, our Government will introduce legislation to place formal limits on the use of the federal spending power for new shared-cost programs in areas of exclusive provincial jurisdiction. This legislation will allow provinces and territories to opt out with reasonable compensation if they offer compatible programs.*

Harper is, by conviction, a classical federalist. But he is also a highly tactical political animal, and in this opening gambit on limiting the federal spending power, he is being both.

He articulated his sense of classical federalism in his interview in the March 2006 issue of *Policy Options*. He said:

> *It's always been my preference to see Ottawa do what the federal government is supposed to do…Ottawa has gotten into everything in recent years, not just provincial jurisdiction but now municipal jurisdiction. And yet at the same time if you look at Ottawa's major responsibilities, national defence, for example, the economic union, foreign affairs, beginning obviously with the most important relationship, with the United States, Ottawa hasn't done a very good job of these things.*

And on tactics, the issue of limiting the federal spending power has the potential to divide the Liberals like nothing since Meech Lake, as between their Quebec caucus and the rest of Canada, especially Ontario. This will be strongly opposed by the *Toronto Star* and other proponents of what is known as strong central government. It's a perfectly honourable vision of Canada, it just doesn't reflect our *BNA* tradition, and never has. Quebec Liberals, already threatened with even further losses in the next election, will be hard pressed to explain voting against limitations to the federal spending power, something Quebec has long asked for.

This is the fundamental bargain of Confederation. The bilingual character of our country has its very origins in the duality of our legal heritage. Long before there was a Charter of Rights, this duality was reflected in the *Constitution Act, 1867*. This is classical federalism, federalism as it was intended by the fathers of Confederation. Without the division of powers, without the asymmetrical features to accommodate Quebec's religion and its English-language minority, Sir John A. Macdonald would not have been the father of our country.

But Harper is also sending a signal to the provinces that he wants a quid pro quo — a stronger economic union.

Consider the next paragraph in the Throne Speech:

> *Our Government will also pursue the federal government's rightful leadership in strengthening Canada's economic union. Despite the globalization of markets, Canada still has a long way to go to establish free trade among our provinces. It is often harder to move goods and services across provincial boundaries than across our international borders. This hurts our competitive position but, more importantly, it is just not the way a country should work. Our Government will consider how to use the federal trade and commerce power to make our economic union work better for Canadians.*

If we have free trade with the United States, shouldn't we have it within Canada? Can't we rid ourselves of barriers to interprovincial trade, the infamous BITs, which cost our economy billions and billions of dollars a year?

Harper has the constitutional power to do this, in article 121 of the *BNA Act,* the common market clause. The stars are also aligning on this one. Premier Charest wants a free trade agreement between Quebec and Ontario, similar to the one between Alberta and British Columbia. Harper has endorsed the idea of a green east-west national electricity grid, under which Manitoba and Quebec would sell much-needed

capacity to hard-pressed Ontario, and under which Newfoundland and Labrador would finally develop the Lower Churchill. Of course, that would require some statesmanship from Danny Williams, and on the evidence, that's not his normal form.

Let me come to the division of powers. Harper's first appointment to the Supreme Court was revealing of his sense of the importance of what he has called "judicial temperament." In his appearance before the parliamentary committee, Marshall Rothstein said the first thing he learned in law school was the division of powers. You could almost hearing the cheering from the PMO.

Harper's stance as a classical federalist puts him in the Conservative tradition as the *BNA* party, in a line that stretches from Macdonald to Mulroney. As classical federalists, all have understood that the provinces are their partners in Confederation, not the vassals of Ottawa.

In the case of Brian Mulroney, the Meech Lake Accord was nothing more or less than an attempt to reconcile the asymmetrical features of *BNA* federalism with the Charter by recognizing Quebec as a distinct society within Canada.

I don't know whether Meech failed because it was badly explained or because it was simply misunderstood. Maybe both. The distinct society was part of a duality clause recognizing the existence of English-speaking Quebecers and francophones elsewhere in the country as "fundamental characteristics" of Canada. In other words, the distinct society would have been interpreted by the courts in light of the duality clause. Brian Dickson, then chief justice, later said the Supreme Court would have had no problem with it. And Roger Tassé, who as deputy minister of justice actually wrote the Charter in 1981, later as a consultant told Prime Minister Mulroney at the famous 1987 all-night Langevin meeting that it did not confer any special status on Quebec.

So perhaps Mulroney's mistake at the time was not referring Meech to the Supreme Court, and asking the very questions asked by its opponents. If he had lost a reference, it would have died, or been amended without recriminations; if he had won, all the opponents, including Pierre Trudeau, would have had nothing to say. It's a very interesting historical "what if?" But I digress.

So the Conservatives are the party of classical federalism, and the Liberals the party of centralizing federalism, pushed even harder in that direction by the NDP in the minority periods of 1963-68 and 2004-06.

The Pearson years were a period of remarkable achievement — the Auto Pact as the precursor of free trade, the Canadian flag and a body of social policy legislation that includes the Canada-Quebec pension plans and medicare. All in two minority Houses, with John Diefenbaker tormenting Pearson nearly every step of the way.

The CPP-QPP was made possible only because of the statesmanship and the sense of Canadian compromise between Prime Minister Pearson and Premier Jean Lesage. The national pension plan would be fully portable, but Quebec would have opting-out with full compensation. It thus participated in a national program on an asymmetrical basis, but gained control of its economic levers, creating the Caisse de Dépôt et Placement du Québec, today a national powerhouse, with a capitalization of $150 billion. It is the greatest success story of the Pearsonian era of "cooperative federalism."

But then on medicare, initially a 50-50 funding proposition between Ottawa and the provinces, this occupation of provincial jurisdiction would take an ominous turn for the provinces in 1978 when the feds unilaterally switched to a block funding formula. At one point, after the cuts in the 1995 budget, the federal share of health care spending fell to as low as 17 percent. When Quebec Premier Jean Charest attended the 2004 health care summit, he noted that nearly 75 percent of his government's new investments were in health care.

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Flash forward to 1980 and the National Energy Program. What was the NEP if not a famous, or infamous, example of Ottawa unilaterally occupying an exclusive provincial jurisdiction — nonrenewable natural resources? There is no better example of centralizing federalism, or what even many federalists in Quebec denounce as "domineering federalism."

Then consider the 2004 campaign platform of Paul Martin's Liberals. Their top three priorities were waiting times in health care, daycare and cities. All were in provincial jurisdiction. The Martin program wasn't even motivated by conviction, it was driven by polls and focus groups. The federal spending power and the federal surplus were being used to occupy provincial jurisdiction. But since the 91 guy was invading 92 turf, Martin had no choice but to negotiate agreements and cut cheques to the provinces.

So Harper's pledge not to invoke the federal spending power in areas of provincial jurisdiction, without major-

ity provincial support, is at least as welcome in Quebec as it is in Alberta.

But there is now a second constitutional framework, the Charter, grafted onto the first. We know what Sir John A. accomplished with the asymmetrical arrangements of the *BNA Act*. The terms of union were the first great Canadian compromise, bringing together two founding language communities, one a majority in the country, and the other the majority in a founding province.

What was Pierre Trudeau trying to achieve with the Charter? He wanted to entrench official languages, minority language rights and multiculturalism. These were the hallmarks of his premiership. But the Charter is not noted or controversial for any of those features. Nor is it often tested for article 2 on freedom of speech and association. Even God isn't controversial, perhaps because He's only in the preamble.

No, the great Charter cases have notably been about the security of the person, article 7, and especially equality rights, article 15. The framers were notably silent, for example, on same-sex marriage, but the courts have subsequently spoken for them on equality rights. You could call this judicial activism, or you could call it judge-made law, but absent Ottawa or the provinces having the courage to invoke the notwithstanding clause, the court, not Parliament, has the last word.

The Charter has spawned a cottage industry of litigation, resulting in an entirely new body of jurisprudence. In the United States, they litigate over whiplash. In Canada, we now litigate over equality rights. And uniquely in the world, the federal government was paying litigants to bite the hand that feeds it through the Court Challenges Program. Most of these interest groups, from LEAF to EGALE, not to mention the Canadian Prisoners Rights Network and the Canadian Committee on Refugees, are clearly on the left of the political spectrum, and they have made interest group litigation a permanent feature of our constitutional and legal affairs.

As Tasha Kheiriddin and Adam Daifallah have noted in their book, *Rescuing Canada's Right*: "Between 1988 and 1998 organizations presented 819 claims and intervened in 30 percent of cases heard by the Federal and Supreme Courts."

In bills drafted in Ottawa, the Department of Justice routinely advises the government where there might be what are delicately referred to as Charter considerations.

But remember, Canadians are profoundly attached to the Charter. They see Charter values as the greatest expression of Canadian values. No sensible political movement or party would get between Canadians and the Charter.

The Martin Liberals twice attempted to put Harper between Canadians and the Charter, successfully in 2004, unsuccessfully in 2006. In June 2004, when his campaign was in trouble, Paul Martin spoke to a women's group in Toronto and said, "I will defend the Charter of Rights." The implication was that Harper wouldn't, and Martin successfully changed the conversation, making it about his opponent rather than him.

He tried it again in the English-language debate in January 2006, when he opened with a constitutional Hail Mary, inviting Harper to join him in renouncing the federal government's use of the notwithstanding clause. His unspoken insinuation was that Harper might invoke it to limit a woman's right to choose. Harper's unruffled response, that the Canadian constitutional tradition was an appropriate balance between British parliamentary paramountcy and the supremacy of the courts in America, defused a potentially dangerous moment.

Yet it was a remarkable spectacle: a sitting prime minister, whose job is to uphold the ultimate authority of Parliament, offering to relinquish his ability to uphold it.

And why? Because no prime minister, Liberal or Conservative, has ever invoked the notwithstanding clause.

The irony is that without the notwithstanding clause there would have been no Charter, as Peter Lougheed pointed out in his September 2006 interview with *Policy Options*.

"The notwithstanding clause *was* the deal maker," as he said. "There would have been no Charter without it."

Only the provinces, notably Quebec and Alberta, have had the courage to use it. In legislating a settlement with hospital workers, Lougheed warned them in the bill that he would invoke it if they took him to court. He didn't need to, because he won those cases, all the way to the Supreme Court. And then Quebec famously invoked it in 1988 to override a high court decision on the language of signs.

But Ottawa has never used the notwithstanding clause, not once in a quarter-century, although Pierre Trudeau, in a letter to Cardinal Emmett Carter of Toronto, once threatened to do so if a woman's right to choose was upheld under article 7 on the security of the person.

And if the override is never used, the question then arises as to its legitimacy. At the end of the day, like the power of disallowance in the *BNA Act*, it could simply fall into disuse. But if the POGG affirms Ottawa's powers in the *BNA Act* tradition, so does the notwithstanding clause in the Charter. It is there for a reason.

So to return to the constitutional metaphor of Canada as two mints in one. The Charter is the candy mint, the *BNA* is the breath mint and the *Constitution Act, 1982* is two mints in one.

But it's important that they be understood, and interpreted, with a sense of balance, and the spirit of Canadian compromise.

The balance of 1867 was apparent in the division of powers, the compromise apparent in the room found for Quebec's minority within Canada and its English-language minority within Quebec. These were the deal makers in one century. *BNA* federalism, division of powers federalism, classical federalism, is on the march again in another century. And if Harper wins a second mandate, it may result in a welcome

rebalancing of the federation.

The balance of 1982 has been missing, because the essential deal maker of the Charter, the notwithstanding clause, has been silent, and risks being lost, unless parliament and the legislatures find the courage to assert their constitutional supremacy over the courts.

And finally, where would Frank Scott have come out on this question of the Charter and the *BNA*? I believe he would have held for both. As he once wrote about individual rights: "To define and protect the rights of individuals is a prime purpose of the constitution in a democratic state."

But he also cherished the *BNA* tradition. There is a good indication in an article by Allen Mills, published in the *Journal of Canadian Studies* in 1997.

> *Scott's regard for history emphasised the extent to which he was sensitive to the important organic and (dare we say it?) "conventional" elements in law's evolution. Canada's constitution had an historical past; much of what 1867 embodied had been presaged over 100 years of constitutional growth. The ideas of the Fathers of Confederation had, in other words, not been plucked out of the air; they had a lineage, so that apprehending the continuity of these ideas with 1774, 1792 and 1846 helped us to understand better their "intentions." These perceived intentions of constitution-makers are linked with other crucial parts of Scott's world view — his belief in politics as an art and as a system of social engineering, in politics as an artifact, something made, intended and willed.*
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> *Clearly what Scott needed was a further justificatory principle to support his view that the* BNA Act *was not only a constitutional consummation devoutly to be wished but one inordinately to be preserved. This he found in his conviction that the Fathers had "got it right," so to speak. In one of his earliest articles, in 1931, Scott had talked of "the intelligent and disinterested" disposition of the framers of the 1867 constitution. Later, in 1942, he described how a new country had been created "with purposes, plans and aspirations to which the constitution bears witness"; 1867 embodied "long range principles" of far-sighted inception. In 1965, he would express similar sentiments: "the amazing thing about this constitution is its boldness of vision and largeness of conception."*

Montreal Gazette archives

F.R. Scott, the renowned constitutional authority, thought the state had the duty "to define the rights of individuals" as Canada did in the Charter 25 years ago. But he was also a product of the *BNA* tradition and thought the Fathers of Confederation "got it right" in the *BNA*.

In other words, the Fathers of Confederation knew what they were doing, and as F.R. Scott wrote, "got it right."

Adapted from the F.R. Scott Lecture at McGill University, November 6, 2007.